IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 574

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL CO., etc., et al., Bankrupt,

ROSCOE BIFOCAL CO., INC., a corporation,
Petitioner,

vs.

RAY SIMON, Individually and as General Partner of RAY SIMON OPTICAL CO.,
Respondent.

Petitioner's Reply to Respondent's Brief

To The Honorable The Justices of the Supreme Court of the United States:

I.

Respondent's brief (pp. 7 and 8) confuses and obscures two important issues before this Court: (1) that the Court below has misconstrued and misapplied the proviso of Sec.

14 c (7) of the Bankruptcy Act in holding that the burden rested on petitioner-objector to actually prove the charges of the specifications of objection to the bankrupt's discharge (instead of requiring merely a satisfactory showing that there were reasonable grounds for believing them to be true, as held by *Federal Provision Co.* v. *Ershowsky,* (C.C.A. 2, 1938) 94 F (2d) 574, 575; *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534; and (2) it obscures the issue that the opinion below is in sharp conflict with decisions in the Second, Fifth and Ninth Circuits.

On p. 7, respondent discusses a false issue, contending that "in the Court of Appeals, petitioner for the first time attempted to urge an additional ground of objection," to the bankrupt's discharge, *i.e.,* concealment of assets. There is no basis in fact for this contention. Respondent did, however, succeed, as the opinion indicates, in confusing the court below. Actually, with respect to the concealment of the $52,000.00 of insurance from the court, the receiver, trustee and creditors, on which insurance his wife borrowed $3,600.00 to purchase an interest in Opticon Corporation immediately after bankruptcy, we made the same argument (although amplified) that we have advanced in footnote 8 (b), pp. 9 and 10 of our Petition. We argued that this concealment of his insurance by the bankrupt was an act of secrecy, along with other indicia of fraud set forth in the footnote, strongly indicating that Mrs. Simon was holding a $3600 interest in Opticon for the bankrupt in fraud of creditors, and that his explanation was, therefore, unsatisfactory under Sec. 14 c (7) of the Act.

The other concealment of $3400.00 "Cash on Hand", disclosed by the Ray Simon Optical Company Balance Sheet of Aug. 6, 1952 (the day of bankruptcy) (Tr. 24), although the facts were contained in the record, was not discovered by us until our briefs had been filed (footnote 6

p. 6 of Petition). In our oral argument we called this item to the Court's attention for the sole purpose of demonstrating conclusively that *Mr. Weinberg, the bankrupt's accountant and bookkeeper, was not testifying truthfully when he told the court that he had been employed by the receiver of the bankrupt estate to make up the balance sheet showing the liquidation value of the merchandise.* We argued that if he had been employed for that purpose the receiver would have, at least, examined the balance sheet. If he had seen it, the very first item "Cash on Hand $3400.00" would have caught his eye, he would have collected it, and it would have been listed as a receipt in his Report which was filed about three months later. (This Report is contained in the bound record in the Court below). At no time did we urge these facts of concealment by the bankrupt as grounds of objection to his discharge, for the simple reason that they were not discovered in time to include them in our specifications of objections.

On p. 7 of respondent's brief, his premise under subpoint (a), "Findings of fact made by a referee and affirmed by a district judge, *when supported by substantial evidence,* cannot be set aside on appeal," is not true without qualification. Such findings may always be set aside *if clearly erroneous.* Remington on Bankruptcy (1941 ed.) Vol. 8, Sec. 3798. Since the documentary evidence shows conclusively that Weinberg was not employed by the receiver to make up the balance sheet as of the day of bankruptcy, that balance sheet stands as one of the business records of the bankrupt concern, and its entries are admissions against that concern that the shrinkage of $50,000, and the losses of over $63,000 in 8¼ months occurred as charged in our specifications of objection, so that the findings of the referee were clearly erroneous.

In the second place, the portion of respondent's premise which we have italicized, *"when supported by substantial evidence"*, begs all questions as to the character of evidence required to render an explanation satisfactory under the Act. We have stated in our Petition that the opinion below is in sharp conflict with the decisions of the Second, Fifth and Ninth Circuits with respect to the character of evidence required. (Our Petition, pp. 12 to 19).

II.

Contrary to respondent's contention, Sec. 14 c (7) of the Bankruptcy Act did not require that petitioner show by a preponderance of the evidence that the bankrupt partnership had sustained unexplained losses.

According to the Second Circuit decisions handed down since 1926, (when the proviso was added by amendment) the objector is no longer required, in first instance, to prove the charges of his specifications by a preponderance of the evidence. This amendment merely requires that the "objector shall show to the satisfaction of the court *that there are reasonable grounds for believing*" that the situation requires the bankrupt "to explain satisfactorily," etc. Collier on Bankruptcy, 14 Ed. Vol. 1, Sec. 14.12, pp. 1292-3; *Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F (2nd) 574, 575, par. "(1)" and "(4)"; *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534. What better showing could have been made than to have produced the bankrupt's business records, the income tax return for 1951 (See Exhibit Vol. p. 1 for the inventory, and p. 2 for "Partners Capital Account"—$26,136.46) and the Ray Simon Optical Company Balance Sheet as of August 6th, 1952, the day of bankruptcy, (Tr. 24) showing the estimated value of the inventory to be $30,000.00, and "Partners Capital Accounts (Deficit) $37,245.48"? Comparing these documents, there was a shrinkage in inventory of $50,000.00, and a loss by

the partners of their original capital account of $26,136.46 and, in addition, a deficit at the close of the 8¼ months of $37,245.48, making a total loss of $63,381.94 in the short period of two thirds of a year.

With this showing the burden shifted according to the decisions of the Second Circuit, and the referee and the parties at the trial so regarded the burden as then being the bankrupt's (Tr. 55, 84). As a result, *the bankrupt thereupon had the burden* not merely of going forward with the evidence, but *of actually proving* that the shrinkage and losses had not taken place, and by evidence that would "really explain." (*Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F (2d) 574, 575—par. "(4)"). But, instead *the bankrupt relied entirely on Weinberg's testimony that he had been employed by the receiver to make up the balance sheet to show the liquidating, and not the actual, value as of the day of bankruptcy,* which testimony is now conclusively shown by documentary evidence in the record to be false. Under the opinions of the *Federal Provision Co.* case, and *Knetzer* v. *Larkin* (U.S.C.A. 2, 1949) 178 F (2d) 532, 534, the bankrupt failed to carry the burden of proving that the losses and shrinkage did not occur, and his discharge under these decisions, and the proviso of the section, would have to be denied.

III.

Under the third section of his brief, respondent declines to discuss the conflict between the opinion of the Court below and the decisions of the Courts of Appeal of the Second, Fifth and Ninth Circuits as to the character of evidence required to render an explanation satisfactory under Sec. 14 c (7) of the Act. Instead, respondent takes the position that there was a dispute as to whether a loss of $63,000, and a shrinkage in inventory of $50,000 had occurred, as we charged in our specifications, and that,

therefore, our authorities were inapplicable. But respondent overlooks the fact that petitioner, as objector, having made the satisfactory showing required by the proviso, *the burden shifted, and there was no longer a dispute,* unless the bankrupt attempted to refute the loss and the shrinkage. Under the decisions of the Second, Fifth and Ninth Circuits, the bankrupt could not refute or explain, as he attempted to do, the loss and shrinkage satisfactorily (as required by the Act) by conflicting, inconsistent and incredible testimony (*Knetzer* v. *Larkin,* U.S.C.A. 2, 1949, 178 F. 2nd 532, 534; *In re Sperling,* C.C.A. 2, 1934, 72 Fed. 259, 260, 261). Nor would his explanation only in vague general terms be satisfactory. (*Federal Provisions Co.* v. *Ershowsky,* C.C.A. 2, 1938, 94 F. 2d 574, 575; *In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 260; *Brenner* v. *Gaunce,* C.C.A. 9, 1938, 28 F. 2d 606, 607). Nor would his testimony without documentary support be satisfactory under the decisions. (*In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 261). His failure, moreover, to call available witnesses who knew the facts, rendered his explanations unsatisfactory (*Knetzer* v. *Larkin,* C.C.A. 2, 1949, 178 F. 2d 532, 534; *In re Sperling,* C.C.A. 2, 1934, 72 F. 2d 259, 261). Finally, his explanation failed to "really explain" since it left many important existing lingering doubts as to the bona fides of transactions. (*Shapiro & Ornish,* D.C. Tex. 1929, 37 F. 2d 403, 406, affirmed by the Circuit Court of Appeals in 37 F. 2d 407).

Respondent's virtual admission of these sharp conflicts between the decision of the Court below, and the decisions of the Second, Fifth and Ninth Circuits with respect to the character of evidence that is required to render an explanation satisfactory under Sec. 14 c (7) of the Act would appear to be fatal to his case.

Respectfully submitted,

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